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In the Supreme Court of the United States

OCTOBER TERM, 1927

No. ——

HUBERT WORK, AS SECRETARY OF THE INTERIOR, petitioner

v.

ROBERT I. BRAFFET, ADMINISTRATOR OF THE ESTATE of Mark P. Braffet, deceased

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA, AND BRIEF IN SUPPORT THEREOF

PETITION

The Solicitor General on behalf of Hubert Work, Secretary of the Interior, prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the District of Columbia entered in the above-entitled cause on April 4, 1927 (R. 22), affirming the decree of the Supreme Court of the District of Columbia (R. 14).

STATEMENT OF FACTS

This case involves the question whether the Supreme Court of the District of Columbia has jurisdiction by mandatory injunction to direct the Secretary of the Interior to vacate his decision rejecting an application under Section 2347, R. S., for the purchase of lands said to contain coal included within the school land grant to the State of Utah, and further to direct the Secretary to issue to the applicant a patent for said lands upon his making payment therefor, where such decision of the Secretary was made by him in the exercise of the discretion vested in him by the applicable statutes and the rules and regulations of the Department of the Interior and the General Land Office.

The case was tried below on bill and answer, so that for the purpose of this petition the facts therein stated are not in dispute. So far as material here, the facts are as follows:

The land involved in the application is the SE. ¼ of Sec. 32, T. 12 S., R. 10 E., S. L. M., Salt Lake City land district.

This tract was included in the school land grant to the State of Utah under the Enabling Act of July 16, 1894, c. 138, 28 Stat. 107, granting to Utah Sections numbered 2, 16, 32, and 36, in every township of the proposed State. The grant became effective by the admission of the State into the Union January 4, 1896. (29 Stat. 876.) The official Government survey had returned the tract as of the

character which passed under the school-land grant, to wit, nonmineral. (R. 11.)

Continuously following the above grant, Utah claimed this tract as granted school lands, and in May, 1902, in due course, sold it for value to Laura Bird, who thereafter conveyed it to the Pleasant Valley Coal Company (hereinafter referred to as the "Coal Company"). (R. 10.)

March 6, 1903, Circular of Instructions (32 L. D. 39) was issued to local land offices, withholding school sections from entry, with directions to hold applications presented under the mining laws to be disposed of in the same manner as contests.

On November 10, 1915, the Secretary of the Interior suspended the functions of local land officers at the Salt Lake City land office as to coal land applications for lands included in school sections, and directed said officers to receive and transmit to the General Land Office all applications to enter, based on alleged mineral character of land, until further orders. Such instructions were in full force and effect to and including June 13, 1918. (R. 6, 7.)

On February 4, 1918, Mark P. Braffet filed in the local land office at Salt Lake City his application to purchase the above-described tract as coal land. Braffet's application to purchase was treated as a contest of Utah's title, under the rules and regulations of the General Land Office, and on July 25, 1918, citation was issued to the State of Utah in accordance with the rule of the General Land Office as to contests. (R. 6–8.)

On August 13, 1918, the State of Utah answered, controverting the contest, and specifically alleging the land to be agricultural in character and "not known coal land" on the date of the grant. The Coal Company intervened with like allegations and both parties prayed for equitable consideration. Braffet assumed the burden of his contest and introduced evidence in support of his claim at a hearing before the local land officers. The State of Utah and the Coal Company, without introducing proof, made a motion to dismiss. (R. 7, 8.)

The motion to dismiss was sustained, and on Braffet's appeal to him the Commissioner of the General Land Office reversed the local office and dismissed the claim of the State of Utah and the Coal Company for equitable consideration, from which action an appeal was taken to the Secretary of the Interior. (R. 8, 9.)

On July 31, 1922, the Secretary rejected Braffet's coal application and found him to be a contestant of Utah's title; held that he had made out a *prima facie* case that the land was known coal land on January 4, 1896, and remanded the case to the local office for the taking of further testimony. He further found that "by reason of the fact that the contestant can acquire no preferred right to the coal deposits and for the purpose of adequately protecting its interests the Government will formally intervene, and be represented by an officer of the field service. In the event that the contestant does not proceed with the contest it will be prose-

cuted by the Government." *Utah* v. *Braffet,* 49 L. D. 212, 224.

On February 25, 1920, while the proceedings above described were in progress and the land in question was *sub judice* in the Department, Congress passed the Coal Leasing Act, c. 85, 41 Stat. 437.

On or about August 3, 1921, the Pleasant Valley Coal Company had procured from the United States under the terms of the Coal Leasing Act a lease covering 1,560 acres near the tract in Section 32, involved herein. In March, 1923, following the rejection of Braffet's application, after due notice by publication and in response to a request therefor from the Coal Company, the only bidder, the Secretary of the Interior modified the prior lease of the Coal Company by including therein all of Sec. 32, the SE. ¼ of which was covered by Braffet's application. (Answer, Par. 10, R. 9–11.) By the terms of such lease the United States became entitled to a certain prescribed royalty upon every ton of coal mined, with right to demand a specific production, and also a fixed annual acreage rental. (R. 11.)

Thereafter, in 1924, Braffet filed his bill of complaint and defendant answered. An amended bill (R. 1) was thereafter filed, and the answer was amended to conform thereto.

The court entered its judgment for Braffet ordering a writ of mandatory injunction to issue against the Secretary of the Interior requiring him to per-

form the various acts therein enumerated. (Decree, R. 14.)

From this decree the Secretary appealed to the Court of Appeals of the District of Columbia. On April 4, 1927, that court sustained the lower court, but remanded the case for the correction of an immaterial error. (R. 17–22.)

QUESTIONS PRESENTED

On the date Braffet filed his application, February 4, 1918, the land in controversy was the subject of the *bona fide* claim of the State of Utah and its grantees, and was not "vacant coal land" subject to purchase. Braffet, therefore, under the rules and regulations of the Secretary of the Interior, was, as held by the Secretary, a mere contestant acquiring no rights to the land.

Prior to the conclusion of his contest, during which he was held to have made out a *prima facie* case against Utah and before Braffet had acquired any right to the land, Congress passed the Coal Leasing Act. Thereby this land, if it was coal land and belonged to the United States, was appropriated to the purposes of the Act and Braffet was entirely cut off from any right to acquire it under a prior law.

If in fact the lands in question were not within the class of lands granted to the State, nevertheless they were part of a designated school section and presumptively passed to the State, and in the absence of a determination of known coal character

at the time of the grant could not have been sold by the United States or become the basis of a lieu selection by the State. The Company, taking a grant from the State under these circumstances, became a *bona fide* claimant to the fee title, and when it exchanged this title in consideration of a lease to the lands acquired a substantial right, which right became the basis of a legitimate dispute. To litigation involving and to a decree determining the invalidity of this right, it is an indispensable party.

The United States asserts that at all times it has been the owner of the lands in question. To a decree holding its title void, and requiring the issuance of a patent conveying the lands to another, it is an indispensable party.

The action was brought in equity. The prayer is for mandatory relief, not injunctive, and only such relief has been awarded. Thus, obviously, an adequate remedy at law existed.

SPECIFICATION OF ERRORS

The Court of Appeals of the District erred—

1. In directing the court below to enter a decree enjoining the Secretary to recognize Braffet's application as valid, to permit the administrator of Braffet to complete the purchase, and to cause to be issued to him a patent for the lands in question;

2. In holding that the rules, regulations, and instructions of the Secretary of the Interior establishing a settled practice with reference to the purchase of lands contained within the limits of a school grant to a State, had no application to this case, and in failing to apply such rules hereto;

3. In holding that the application of Braffet to purchase the lands in suit vested in Braffet any right to purchase such lands after the passage of the Coal Leasing Act;

4. In holding that the lands in suit were at the time of the filing of Braffet's application "vacant coal lands of the United States" subject to entry and in holding that the *bona fide* claim of the State of Utah had no effect in withdrawing said lands from entry and that the established rules of procedure of the Land Department as to contests have "no application here." (This is contrary to *Stewart* v. *Peterson,* 28 L. D. 515, 519, quoted with approval in *Holt* v. *Murphy,* 207 U. S. 407; see also *Germania Iron Co.* v. *James,* 89 Fed. 811);

5. In directing the issuance of a patent herein to Braffet, the effect of which will be to divest the United States of all title to the tract which it has leased to the Pleasant Valley Coal Company under the Coal Leasing Act, in the absence of the United States and of the Pleasant Valley Coal Company, both indispensable parties; and

6. In failing to hold that there was no basis for the exercise of equitable jurisdiction, where, as is

apparent from the decree, an adequate remedy at law existed.

REASONS FOR GRANTING THE WRIT

The reasons why the writ should issue are:

1. The decision of the Court of Appeals denies that force and efficacy to the rules, regulations, and instructions of the Secretary of the Interior, issued by him in the due exercise of his authority, judgment, and discretion, as the administrator of the public land laws of the United States, recognized by the law, and the decisions of this Court. The effect of the court's decision is to overturn a settled practice of the Land Department, long followed and observed by it, and to set up in place thereof a new rule of law, which in its operation could not be confined to this particular case, and the general effect of which will be so far-reaching in the future administration of these laws, as to warrant consideration thereof by this Court;

2. The decision of the Court of Appeals fails to give effect to the Coal Leasing Act of February 25, 1920, as to coal lands of the public domain, title to which did not pass under the school land grant;

3. The decision of the Court of Appeals places an erroneous interpretation on the term "vacant coal lands" as used in Section 2347, R. S., and entirely disregards the effect of a *bona fide* claim, as withholding a tract of those lands from public entry;

4. The title to land has been determined by the decision, in the absence of parties indispensable thereto; and

5. The jurisdiction of the court to extend any relief whatsoever, in the form of proceeding selected and pursued, seems incompatible with the decisions of this Court distinguishing between actions at law and in equity.

For these reasons it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Appeals of the District of Columbia should be granted.

WILLIAM D. MITCHELL,
Solicitor General.

JUNE, 1927.

BRIEF IN SUPPORT OF PETITION

OPINIONS OF THE COURTS BELOW

The Supreme Court of the District of Columbia rendered no opinion; its decree appears at page 14 of the Record. The opinion of the Court of Appeals of the District of Columbia (R. 17) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered April 4, 1927. (R. 22.)

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES INVOLVED

Section 2347, R. S. (see U. S. C., Title 30, Sec. 71), provides:

Every person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal-lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

Section 2351, R. S. (see U. S. C., Title 30, Sec. 75), provides:

> * * * The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

The Act of February 25, 1920, c. 85, 41 Stat. 437, 438, 451 (see U. S. C., Title 30, Secs. 181, 201, 193), contains the following provisions:

> SEC. 1. That deposits of coal, phosphate, sodium, oil, oil shale, or gas, and lands containing such deposits owned by the United

States, including those in national forests, but excluding lands acquired under the Act known as the Appalachian Forest Act, approved March 1, 1911 (Thirty-sixth Statutes, page 961), and those in national parks, and in lands withdrawn or reserved for military or naval uses or purposes, except as hereinafter provided, shall be subject to disposition in the form and manner provided by this Act to citizens of the United States, or to any association of such persons, or to any corporation organized under the laws of the United States, or of any State or Territory thereof, and in the case of coal, oil, oil shale, or gas, to municipalities * * *.

SEC. 2. That the Secretary of the Interior is authorized to, and upon the petition of any qualified applicant shall, divide any of the coal lands or the deposits of coal, classified and unclassified, owned by the United States, outside of the Territory of Alaska, into leasing tracts of forty acres each, or multiples thereof, and in such form as, in the opinion of the Secretary of the Interior, will permit the most economical mining of the coal in such tracts, but in no case exceeding two thousand five hundred and sixty acres in any one leasing tract, and thereafter the Secretary of the Interior shall, in his discretion, upon the request of any qualified applicant or on his own motion, from time to time, offer such lands or deposits of coal for leasing, and shall award leases thereon by

competitive bidding or by such other methods as he may by general regulations adopt, to any qualified applicant: *Provided,* That the Secretary is hereby authorized, in awarding leases for coal lands heretofore improved and occupied or claimed in good faith, to consider and recognize equitable rights of such occupants or claimants: * * * *And provided further,* That no lease of coal under this Act shall be approved or issued until after notice of the proposed lease, or offering for lease, has been given for thirty days in a newspaper of general circulation in the county in which the lands or deposits are situated: * * *.

* * * * *

SEC. 37. That the deposits of coal, phosphate, sodium, oil, oil shale, and gas, herein referred to, in lands valuable for such minerals, including lands and deposits described in the joint resolution entitled "Joint resolution authorizing the Secretary of the Interior to permit the continuation of coal-mining operations on certain lands in Wyoming," approved August 1, 1912 (Thirty-seventh Statutes at Large, page 1346), shall be subject to disposition only in the form and manner provided in this Act, except as to valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery,

STATEMENT

A statement of the facts and of the errors assigned will be found in the petition for certiorari.

ARGUMENT

I

THE COURT OF APPEALS FAILED TO GIVE PROPER EFFECT TO THE APPLICABLE STATUTES AND TO THE RULES AND REGULATIONS OF THE LAND OFFICE

In this case the lower courts have assumed jurisdiction to review and correct by mandatory injunction decisions of the special tribunal created under the Constitution of the United States for the purpose of administering the sale of public lands of the United States, and as a necessary step in such action have disregarded rules and regulations established by the Secretary of the Interior and by the Commissioner of the General Land Office.

The decision below directs the Secretary to vacate his decision upon matters of fact involving the exercise of the essential discretion vested in him by the statutes and by the rules and regulations referred to, not merely the performance of a ministerial act. This action goes far beyond the limitations upon judicial power laid down by the decisions of this Court.

II

THE POWER OF THE COURTS TO REVIEW ACTION OF THE LAND DEPARTMENT IS EXTREMELY LIMITED

In *Steel* v. *Smelting Company*, 106 U. S. 447, this Court sustained a patent to mineral lands against

collateral attack. Referring to the effect of decisions of the Land Department it was held, at page 450:

> We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

In *United States* v. *Schurz*, 102 U. S. 378, at page 395, this Court said:

> The Constitution of the United States declares that Congress shall have power to dispose of and make all needful rules and

regulations respecting the territory and other property belonging to the United States. Under this provision the sale of the public lands was placed by statute under the control of the Secretary of the Interior. To aid him in the performance of this duty, a bureau was created, at the head of which is the Commissioner of the General Land Office, with many subordinates. To them, as a special tribunal, Congress confided the execution of the laws which regulate the surveying, the selling, and the general care of these lands.

Congress has also enacted a system of laws by which rights to these lands may be acquired, and the title of the Government conveyed to the citizen. "*This court has with a strong hand upheld the doctrine that so long as the legal title to these lands remained in the United States, and the proceedings for acquiring it were as yet in fieri, the courts would not interfere to control the exercise of the power thus vested in that tribunal. To that doctrine we still adhere.* (Italics ours.)

The paragraph last quoted was quoted with approval in *Plested* v. *Abbey*, 228 U. S. 42, at page 51, a case in which this Court held squarely that (p. 50)—

> while the title to public lands remains in the United States and the proceedings for acquiring that title are still *in fieri* the courts are without power, by injunction or otherwise, to control the judgment and discretion

> of the officers of the land department in respect of the disposal of such lands under the public land laws.

The rule laid down in *United States* v. *Schurz* was approved by this Court in *Cameron* v. *United States*, 252 U. S. 450, at 460.

In the recent case of *Work* v. *Rives*, 267 U. S. 175, this Court held that the courts did not have power to review a decision of the Secretary of the Interior under Section 5 of the Dent Act, where such decision involved the construction of the statute, and the Court took occasion to refer to decisions limiting the power of the courts to review the discretionary action of the Secretary of the Interior under the Land Laws, in the following language, which appears at page 183:

> *Ness* v. *Fisher*, 223 U. S. 683; *Riverside Oil Company* v. *Hitchcock*, 190 U. S. 316; *Alaska Smokeless Company* v. *Lane*, 250 U. S. 549; and *Hall* v. *Payne*, 254 U. S. 343, were all cases in which it was sought to control and reverse rulings of the Secretary of the Interior, on the ground that he had in the administration of the land laws made a ruling contrary to law against an applicant for action by him. In each case it was held that as the statute intended to vest in the Secretary the discretion to construe the land laws and make such rulings, no court could reverse or control them by mandamus in the absence of anything to show that they were capricious or arbitrary. It was pointed out that a man-

damus could not be made to serve the function of a writ of error, and the mere fact that the court might deem the ruling erroneous in law gave it no power to intervene. These cases are supported by earlier authorities to the same effect. *United States ex rel. Tucker* v. *Seaman,* 17 How. 225; *Gaines* v. *Thompson,* 7 Wall. 347; *Litchfield* v. *Register and Receiver,* 9 Wall. 575; *United States ex rel. Dunlap* v. *Black,* 128 U. S. 40. All rest upon the *Decatur Case.* (*Decatur* v. *Paulding,* 14 Peters, 497.)

III

UNDER THE DECISIONS OF THIS COURT AND THE LONG-ESTABLISHED RULES AND REGULATIONS OF THE LAND DEPARTMENT, THE FILING OF BRAFFET'S APPLICATION CREATED NO RIGHTS IN THE LAND

Coming now to the facts of this case, the record discloses that on February 4, 1918, the date on which Braffet filed his application in the Salt Lake City land office—

(*a*) Title to the tract in question had presumptively passed to the State of Utah upon the passage of the Act of January 4, 1896, admitting Utah to statehood and confirming the Act of July 16, 1894, making the school grant to the State, and the land had been segregated from the public domain subject to other disposition both in law and in fact and upon the records of the local land office;

(*b*) School lands had been withdrawn by the Land Department from any form of entry, with directions to local offices to hold applications to be

disposed of in the same manner as contests (Circular of Instructions, March 6, 1903, 32 L. D. 39); and

(*c*) The functions of the officers of the Salt Lake City land office had, on November 10, 1915, been suspended as to coal-land applications for lands included in school sections, and directions given to the local officers to receive and transmit to the General Land Office all applications to enter, based on alleged mineral character of the land, until further orders. These instructions remained in full force until June 13, 1918.

Therefore the filing of the application gave Braffet simply the status of a contestant of the claim of Utah, and he in no sense secured a vested interest in the land.

He certainly did not secure a preferred right of entry contingent upon the successful prosecution of the contest, such as is conferred expressly by statute upon contestants of homestead entries (Sec. 2, Act of May 14, 1880, c. 89, 21 Stat. 140, 141, as amended; see U. S. C., Title 43, Sec. 185), as his contest was not against an entry of that character. See *Hartman* v. *Warren,* 76 Fed. 157; *Howell* v. *Sappington,* 165 Fed. 944.

The school land grant to Utah operated *proprio vigore* as a conveyance and stands in lieu of a patent. The granting Act effects a segregation of the designated school land sections from the mass of public domain subject to other disposition, and this

segregation continues until the claim of the State under the statute is destroyed by proof that the land is not of the character specified in the grant, made in the course of orderly procedure in the Land Department, and the final notation of the action taken, rejecting the claim, on the records of the local land office.

Had the State sought to relinquish its claim to this section in order to perfect a right to select land in lieu thereof, proof would have been required before allowing such relinquishment, and until such proof was furnished and the result noted on the records of the local land office the original segregation would have continued in force.

In *Shepley* v. *Cowan,* 91 U. S. 330, Shepley and others claimed title to land under a patent from the State of Missouri, and based upon an approval of a selection made by the State under a certain grant. It appeared that, at the date of said selection and at date of its approval, the land was claimed by the village of Carondelet, as a part of its commons, assured to it by Act of Congress. It was years later determined, as a matter of fact, that the boundaries of said commons did *not* include this land. In holding the asserted title under the State grant and patent to be without lawful basis, this Court said, at page 336:

> The general rule of the land department is, and from the commencement of the government has been, to hold as excluded from

> sale or preemption lands which might, in the execution of the laws of Congress, fall within grants to others; and therefore, in this case, until it was decided by the final determination of the Secretary of the Interior or of the Supreme Court of the United States whether the northern line of the commons was that run, as alleged, by Soulard previous to 1800, or that retraced by Brown in 1834, the land between those lines, embracing the premises in controversy, was legally reserved from sale, and, consequently, from any selection by the State as part of its five hundred thousand acres granted by the act of Sept. 4, 1841.

It requires but a slight paraphrasing of the above statement of facts and controlling law to cover the instant case as follows:

> Until it was decided by the final determination of the Secretary of the Interior that the land within this school section did not pass to the State of Utah, under its school grant, because of its known mineral character at date of admission of the State of Utah, the land was legally withdrawn from sale, and, consequently, from purchase by Braffet under the coal land laws.

It is a well-settled rule in the Land Department that no application will be received, nor any rights recognized as initiated, by the tender of an application for a tract embraced in an entry of record, until

said entry has been canceled upon the records of the local office.

Walker v. *Snider,* 19 L. D. 467.
Stewart v. *Peterson,* 28 L. D. 515, 519.
Hiram M. Hamilton, 38 L. D. 597.

This is not an arbitrary regulation, but one that experience has demonstrated to be necessary to afford notice to the public that land which has been segregated *prima facie* from the public domain is restored thereto and is subject to appropriation. Such rule is designed to give equal opportunity to each citizen. The rule has been specifically applied to school land grants to the States.

Santa Fe Pac. R. R. Co. v. *California,* 34 L. D. 12.
Charles L. Ostenfeldt, 41 L. D. 265.

Likewise to every form of appropriation or segregation.

Calif. and Oregon Land Co. v. *Hulen and Hunnicutt,* 46 L. D. 55.
State of New Mexico v. *Weed,* 49 L. D. 580.

It has been held that failure of the Land Department to apply this rule was error at law. *Germania Iron Co.* v. *James,* 89 Fed. 811.

In the case of *Holt* v. *Murphy,* 207 U. S. 407, 414, this Court considered various decisions rendered by the Interior Department and quoted with full approval from the decision in *Stewart* v. *Peterson,* 28 L. D. 515, the following statement of law:

> In order that this important matter of regulation may be perfectly clear, it is directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office.

After discussing that rule, this Court further said (p. 415):

> Such a rule, when established in the Land Department, will not be overthrown or ignored by the courts, unless they are clearly convinced that it is wrong. So far from this being true of this rule, we are of opinion that to enforce it will tend to prevent confusion and conflict of claims.

Under Section 2347, R. S., prior to the Coal Leasing Act, only "vacant coal lands of the United States not otherwise appropriated or reserved by competent authority" were subject to purchase. The school land grant to Utah was a reservation of the section from other disposition, even had the section not been in effect reserved under the above-mentioned rules and regulations of the Land Department made pursuant to law and recognized by the courts.

Therefore, under the rules and regulations of the Land Department Braffet by his application secured no other or greater right than that of a contestant of the title of the State. Until this contest had terminated in the course marked by the

rules and regulations, then in force, and in accordance with the established procedure in such cases, the land involving the proceedings was not subject to any form of entry nor to purchase by Braffet under his coal land application.

This condition created no obstacle to the full exercise of ownership by the United States:

> *Shepley* v. *Cowan, supra.*
> *Frisbie* v. *Whitney,* 76 U. S. (9 Wall.) 187.
> *The Yosemite Valley Case,* 82 U. S. (15 Wall.) 77.
> *Campbell* v. *Wade,* 132 U. S. 34, 37.
> *United States* v. *Morrison,* 240 U. S. 192.
> *United States* v. *Norton* (C. C. A. 5th), decided June 9, 1927 (not yet reported).
> *Alice M. Reason,* 36 L. D. 279, 280–1.
> *Instructions,* 40 L. D. 416–417.

Vacant lands are such as are absolutely free, unclaimed, and unoccupied. *Payne* v. *U. S. ex rel. Olson,* 50 App. D. C. 119, citing *Cosmos Exploration Co.* v. *Gray Eagle,* 112 Fed. 4, which was affirmed in 190 U. S. 301.

In *United States ex rel. Durnford* v. *Fall,* 285 Fed. 887, the court said (p. 888):

> It will be observed that the sole ground for cancellation of relator's entry, as stated by the Secretary, was that the land, at the time the entry was made, was not vacant public land of the United States. This is where we think the case turns.

Then, after quoting from Section 2347, R. S., and from the earlier case of *Payne* v. *Olson, supra,* the same court said (p. 889):

> In the present case, however, we are of the opinion that the oil entries, whether valid or void, amounted to sufficient occupancy of the land within the statute to exclude it from entry as coal land. The land being occupied we are not concerned in this proceeding with the validity of the oil entries or the legality of the assignments which were made.

In the *Durnford case* both the Department and the court held that the land did not fall within the class open to purchase under Section 2347, R. S., because it was not "vacant coal lands of the United States." That was because the land was occupied by persons under a placer mining claim. In the *Durnford case* physical occupancy removed the land from the category of public lands, and here the record claim of the State had the same effect.

IV

BRAFFET NEITHER DID, NOR LAWFULLY COULD, PRIOR TO THE PASSAGE OF THE COAL LEASING ACT, PERFORM THE ACTS PREREQUISITE TO THE ACQUISITION OF A VESTED RIGHT

Braffet had neither tendered nor paid the price required to complete his purchase of the land prior to the appropriation thereof by the Coal Leasing Act; neither could he have done so, as his contest was at the time of the passage of that Act still pending and undetermined. No vested right to the land prior to the passage of that Act could have been acquired by Braffet, except by actual entry and payment of the purchase money under Section 2347,

R. S., and it is conceded that Braffet has done neither. Mere filing of the application could not therefore intercept the operation of the Coal Leasing Act, and unless the claim was of the class expressly excepted by the Act it was necessarily extinguished.

Certainly there is no doctrine of relation whereby the determination of such contest in favor of the contestant relates back to the time of the filing of the application or the initiation of the contest, so as to limit the right of the United States acting as owner and proprietor of the land (assuming that title did not in fact pass to the State under the school-land grant) to appropriate the land to some other use or provide for some other form of disposition.

At the time of the school land grant the tract in controversy, as a matter of fact, was not known to be coal land, either by the officials of the State or by the officers of the Land Department. The record discloses that more than twenty years elapsed between the date of the grant and the date when Braffet filed his application and that during that period the State had treated the land as State school land, agricultural in character, to which it held full title, and had sold in due course for value. The Land Department had treated the land as of that character and as having passed to the State and had caused its records to so indicate. Braffet by filing his application to purchase merely challenged that record, and the only result of his ultimate success would have been to provide the grounds for an

entry cancelling the grant to Utah and designating the tract as "vacant coal land."

Only after such an entry had been made could the land become again subject to original application to purchase, and subject to applications upon equal terms by Braffet or by any other person qualifying as an applicant coming within the provisions of Section 2347, R. S.; but no such entry was made in view of the fact that in 1920, over two years before Braffet's appeal before the Secretary was decided and the case sent back for further proceedings, the Coal Leasing Act became law and the land was effectively appropriated to the purposes of the Act.

V

THE WITHDRAWAL OF THE STATE OF UTAH AFTER THE DECISION OF THE SECRETARY OF THE INTERIOR DID NOT HAVE THE EFFECT ATTRIBUTED TO IT BY THE COURT OF APPEALS

The Court of Appeals in its opinion referred to the established practice of the Land Department to the effect that where an application for the purchase of coal lands is made on school numbered sections, the applicant is given the status of a contestant with the burden on him to establish that the lands were well-known coal lands at the date of the grant, the State in each instance being the contestee.

It was further stated that while the courts would not feel inclined by extraordinary process to disturb the construction thus placed on the land law

and consistently adhered to by the Department for a long period of time "that rule has no application here, since the contestee, the State, after being given an opportunity to produce testimony to defeat Braffet's *prima facie* case, voluntarily withdrew from the contest, thus surrendering any rights it may have had thereunder as contestee." (R. 20.)

The court failed to take into account the important fact which appeared in the answer (Answer, Par. 10, R. 9) that the withdrawal of the State from the controversy was "without prejudice to the interests or rights of the intervener, the said Pleasant Valley Coal Company, for the reason, as therein set forth, that it had no beneficial interest in the land in controversy because on or about May 14, 1902, it had parted with its title by issuing its patent therefor to one Laura Bird."

It should further be noted that the act of withdrawal limited as above indicated took place after the decision of the Secretary in 1922, or more than two years after the passage of the Coal Leasing Act. Even had the withdrawal been unlimited, it could not operate retroactively so as to make the tract in question "vacant coal lands" at the time of filing Braffet's application in 1918, when the State was in good faith claiming title on behalf of itself and its grantees under the school-land grant.

VI

THE COURT OF APPEALS FAILED TO GIVE PROPER EFFECT TO THE PROVISIONS OF THE COAL LEASING ACT OF FEBRUARY 25, 1920

The Court of Appeals held (R. 21) that "the lease and the Leasing Act have nothing to do with this case." This holding was clearly erroneous and failed to recognize the status of the land in question either upon the date of the passage of the Coal Leasing Act or upon the date of the decision of the Secretary of the Interior, July 31, 1922.

Section 37 of the Coal Leasing Act (page 13, *supra*) excepted from its operation "valid claims existent at date of the passage of this Act and thereafter maintained in compliance with the laws under which initiated, which claims may be perfected under such laws, including discovery."

Unless, therefore, claims of the class asserted by Braffet came within the express exception above quoted, the tract here under consideration was on February 25, 1920, effectively appropriated to the purposes of the Act and withdrawn from purchase under Section 2347, Revised Statutes, thus cutting Braffet off from the right he might otherwise have had, upon final determination of his contest and making of the proper entry thereof in the local office, of making anew an application for the purchase of the tract as coal land.

In view of the decisions of the Land Department and of the courts to which we have referred above,

so long as the title to the tract was *sub judice* in the Department on Braffet's contest—that is, until a final determination—Braffet could not either complete his purchase under Section 2347, R. S., or secure vested rights to the land by any other kind of filing or entry, and his contest was clearly not a claim falling within the exception.

While Utah withdrew without prejudice to the right or title of those claiming as its grantees, the Coal Company, claiming as such grantee, did not withdraw until 1923, when its withdrawal was expressly conditioned on the grant to it by the Government of a valid lease under the Coal Leasing Act. (R. 10.) Its offer to waive its claim under the State grant was expressly conditioned on the grant of the lease, and such waiver was by way of compromise of a long pending controversy.

If the act of the Secretary of the Interior in effecting the compromise by granting the coal lease be deemed a final determination of Braffet's contest, such as might *otherwise* have operated to open the land to purchase under the Coal Land Laws, the Leasing Act had placed the land in a category no longer open to purchase, as the land was by that Act effectively "appropriated" and "reserved by competent authority" from sale to any person, and such appropriation and reservation became instantly operative upon determination that the title had not passed to the State of Utah.

Therefore it follows that there never existed any moment of time when this land was lawfully sub-

ject to Braffet's application to purchase under the Coal Land Law.

The decision of the Court of Appeals would compel the Secretary of the Interior to issue a patent to Braffet, conveying the fee title to this valuable tract in the teeth of the provisions of the Coal Leasing Act, thus, in effect, requiring the Secretary to perform an act which Congress has expressly prohibited, thereby nullifying the terms of the Coal Leasing Act under which the land has been leased by the Secretary to a third person, not a party to this suit.

The decision of *United States* v. *Morrison*, 240 U. S. 192, sustains the general principle that until actual vesting of title to public lands they remain subject to such disposal by Congress as may defeat an inchoate or possible claim.

The Court said, at page 212:

> Again, it is urged that the survey when approved related back to the date of the grant or at least to the date of the survey in the field. The former contention is but a restatement in another form of the argument that Congress could not dispose of the land pending the survey which as we have seen is answered by the terms of the grant; and if Congress had this power of disposition, it must mean that the lands could be disposed of under the authority of Congress at any time before the survey became a completed administrative act. The doctrine of rela-

tion can not be invoked to destroy this authority.

That same rule, applied in the instant case, would recognize the power of Congress to enact the Coal Leasing Act with its repeal of the prior coal land laws, subject only to previously vested rights thereunder. Under that rule it is clear that in 1922 when the claim of Utah under its school grant was rejected (in effect) the land had already, in 1920, been reserved by Congress from sale to any person. Hence it was not then open to purchase by Braffet.

VII

THE COURT OF APPEALS ERRED IN HOLDING THAT THE PLEASANT VALLEY COAL COMPANY WAS NOT AN INDISPENSABLE PARTY

In its opinion the court said (R. 21):

> The coal company acquired no rights either through the State of Utah or through its lease that could in any way impair the right of Braffet acquired through the filing of his application to purchase.

As Braffet acquired no right except that of a contestant, the above finding becomes an erroneous premise upon which to base the holding of the court that the Coal Company is not an indispensable party hereto.

Again the court said (R. 21):

> The position here assumed by the Secretary and the coal company is highly incon-

> sistent, since as a condition precedent to the execution of any sort of a pretended lease the Secretary must have relied upon his finding that the lands were known coal lands on the date of the grant to the State, and upon the further admission of that fact by the coal company.

This statement of the court apparently does not encompass the fact that the Secretary also relied upon the lack of right in Braffet, the status of Braffet under the regulations of the Department, and the effect of the passage of the Coal Leasing Act in entirely cutting off his right to refile his application to purchase; nor the further fact that the lease to the Coal Company was made following the exercise of his official judgment and discretion in the determination of questions within his sole jurisdiction, viz, that the land was vacant coal land not subject to entry; that no valid claim thereto existed; that title thereto was in the United States; that it was subject to the provisions of the Act; and that the Coal Company was in a position to handle the tract under its lease of the adjacent lands in the interest of the United States, the owner. *Kirwin* v. *Murphy,* 189 U. S. 35.

With these conditions existing, why should not the Secretary have disposed of it to the Coal Company? It had equities therein, or at least apparent equities, arising from its attempt to purchase from the State of Utah in good faith and the payment

of taxes upon the land for a long period of years. (R. 10.)

These equities having been recognized by the modification of the Coal Company's already existing lease on adjacent lands, and the incorporation of these lands therein, the Coal Company has a substantial claim, as to which it has a right to be heard. The possibility of its defeat on grounds of error on the part of the Secretary is beside the question; the Coal Company holds a lease to the lands executed by the United States and in exchange for which it surrendered its claim to the fee title; it is in possession thereunder claiming all the rights vouchsafed by the Coal Leasing Act; its presence is necessary to an adjudication of the invalidity of its lease. Yet the lower court and the Court of Appeals, without affording opportunity to the Coal Company to say aye or nay, try the question, pronounce the lease void, and render judgment to that effect, with it absent from each court.

In *Brady* v. *Work*, 263 U. S. 435, the Court affirmed a decree dismissing a bill for injunction against the officers of the land office, seeking to enjoin them from issuing a patent to certain homestead lands on the ground of the absence of the party in whose favor the Department had decided, saying, at page 437:

> Lillie S. Harner is the person whom the administrative officers of the Government have held to be entitled to a patent for this

land. Clearly the controversy between the plaintiff and those officers involving the granting of a patent to her can not be settled without her presence in court. *New Mexico* v. *Lane,* 243 U. S. 52, 58; *Litchfield* v. *Register and Receiver,* 9 Wall. 575, 578. She is entitled to be heard. Inability to secure service on her because she lives in Arizona can not dispense with the necessity of making her a party.

It is respectfully submitted that the position of the Coal Company in this suit is analogous to that of the successful applicant in *Work* v. *Brady,* and that the Coal Company was an indispensable party to this suit.

VIII

THE COURT OF APPEALS ERRED IN HOLDING THAT THE UNITED STATES WAS NOT AN INDISPENSABLE PARTY

The land was segregated from the public domain by the school grant, and the *bona fide* claim of Utah thereto. Braffet, by the filing of his application to purchase, his contest flowing therefrom, the conclusion of the Secretary that he had made out a *prima facie* case against Utah's title, secured no vested rights in the land; consequently no title passed out of the United States, and under such a state of affairs it is entitled to defend its title against any apparent unlawful claim thereto. A judgment such as the decree here, in effect determining the invalidity of its title, and divesting it thereof without its presence, is wholly beyond the jurisdiction and

authority of the court. This being merely a case involving the action of the Secretary of the Interior, as in injunction or mandamus, is not one in which title may be settled or adjudicated. The sole question is the right of the court to require or restrain action by the Secretary of the Interior; it has ordered the execution of a patent to lands, title to which is apparently vested in the United States, with no color of right in Braffet, in his favor, after consideration and determination against the United States, in its absence, wholly ignoring the finding of the Secretary of the Interior, and the rules and regulations under which such finding was reached.

The United States claims ownership, also, of the lease to the Coal Company. Thereby a royalty is to be paid upon the coal mined from said tract. By the execution of a patent, the United States not only is divested of the fee in the land but likewise of its lease, for it is apparent the Government can not issue a patent containing reservations. The order of the court renders title to Braffet, and effectually conveys to him the right to royalties accruing under the lease, and the United States has been denied any right, independent of the Secretary of the Interior's right as against mandamus or injunction, to be heard, or to be present in the action.

IX

THE COURT OF APPEALS ERRED IN HOLDING THAT THERE WAS BASIS FOR THE EXERCISE OF EQUITABLE JURISDICTION, AS AN ADEQUATE REMEDY AT LAW EXISTED

This action was begun by the filing of a bill in equity, praying for the issuance by the court of a writ of mandatory injunction. No relief either is asked or granted which could not have been obtained and extended, if at all, through mandamus. The bill seeks no injunctive relief, prays wholly for mandatory relief, and the lower court granted no injunctive relief. (Decree, R. 14.) Here is the prayer (R. 5):

> Wherefore plaintiff prays that a writ of subpœna issue directed to said Secretary defendant, requiring him to appear herein and answer the exigencies of this bill of complaint; that a mandatory injunction issue against the defendant Secretary, directing that the decision of the Department of the Interior of July 31, 1922, be vacated and that the prior said decision of the Commissioner of the General Land Office be affirmed in all respects, and that it be further adjudicated and decreed that the said application of plaintiff was valid, and that he be permitted by the defendant Secretary to complete his purchase of said lands in the manner provided by law, and thereupon that a patent shall issue to plaintiff therefor. That plaintiff may have such other and further relief as may be just and equitable.

The Court of Appeals concluded that only the ministerial act of issuing to Braffet a patent remained to be done by the Secretary, and ordered it. It also held that in its decree the lower court had exceeded its authority in an immaterial particular which it ordered corrected by a modification; but that does not affect the fact that, when the bill of complaint was filed, if plaintiff was entitled to any relief he could have obtained it through mandamus. Equity, therefore, has no jurisdiction.

CONCLUSION

The decision of the Court of Appeals is in direct conflict with the rules and practice of the Department of the Interior which have been in effect for more than 40 years; this practice has been uniformly recognized by this Court whenever it has come within its purview, as a wise and equitable regulation. To permit this decision to stand will so affect the policy and procedure of the Department as to completely revolutionize its future attitude in such cases, and it should have the serious consideration of this Court. The other questions of error to be raised for consideration, while not of the same outstanding importance to the Department and to future public land claimants, are so closely interrelated to the public rights of the United States as the owner and lessor of coal and other public mineral lands as to require their proper

disposition, particularly as related to the lands covered by school grants to the various States.

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JUNE, 1927.